

or jurisdiction exist.

On November 8, 2002, a hearing convened before ALJ Tanya Cooper at the SOAH offices located in Dallas, Dallas County, Texas. All parties were present. TABC Staff was represented at the hearing by its attorney, Timothy Griffith. Applicant was represented by counsel, Greg Gutman. Protestant, Ornan Investments Inc., was represented by James Chao. The record was closed on the same date.

EVIDENCE RECEIVED

Background.

Applicant seeks a Wine and Beer Retailer's Permit and a Food and Beverage Certificate from the Commission for a premises located at 10217 Harry Hines Boulevard, Suite No. 101, Dallas, Dallas County, Texas. Applicant's representative, Jia Yin Xu, previously held Commission-issued permits or licenses for a business known as Gene's Liquor Store (Gene's). Gene's was a licensed premises selling alcoholic beverages, including liquor, for off-premises consumption.

Gene's Liquor Store is located at 2445 Northwest Highway, Suite 109, Dallas, Dallas County, Texas, near Applicant's restaurant. Jia Yin Xu sold Gene's Liquor Store to Ornan Investments, Inc. in February 2002.

Witness Testimony.

James Chao testified at the hearing. He discussed the negotiations for the purchase of Gene's Liquor Store. Mr. Chao said that he and others involved in purchasing Gene's did not know very much about the liquor store business. Upon purchasing Gene's, the business's profits were primarily from cashing checks. It was estimated that only 20 percent of business revenues were derived from grocery sales, including alcoholic beverages.

Mr. Chao alleged that once the sale was finalized, Ms. Xu opened the same type of business across the street. She charged less for cashing checks to lure old customers to her new business. He also stated that the value placed on Gene's inventory of alcoholic beverage had been inflated, and tax valuations were at a higher figure than the business was actually worth.

In his opinion, Ms. Xu had not lived up to "moral" obligations inherent to their business deal. He did, however, concede that she had likely not done anything "illegal." Mr. Chao admitted that there had been an appraisal of Gene's inventory by an independent appraiser prior to the deal being finalized. He also acknowledged that the negotiations for the sale and purchase of the business had been primarily carried out via attorneys and real estate agents, not between he and Ms. Xu.

Ms. Xu testified that when Gene's Liquor Store was sold to Ornan Investments, Inc., she did not know what type of new business venture she wanted to start. She looked at several opportunities

before she was contacted by the landlord of a premises near Gene's which was being operated as an Italian restaurant. The landlord of the building expressed interest in Ms. Xu starting a restaurant in the space occupied by the Italian restaurant. Approximately three months had passed since the sale of Gene's to Ornan Investments, Inc. when Ms. Xu opened the Happy Hour Café.

Ms. Xu said that Happy Hour Café is a Chinese restaurant. Her current application is to allow her to sell beer and wine on the premises with meals served at the restaurant. She said that she did not believe that activity would be contrary to the Non-Competition Agreement (See, Applicant's Exhibit 1) that was a part of the sales contract for Gene's.

Ms. Xu testified that while she managed Gene's Liquor Store, she had never had any difficulties with TABC Staff. She knew of no reason why her current application should be denied.

Ms. Xu said that Mr. Chao had told people in the neighborhood that she was a liar and a cheat. She stated that on one day, Mr. Chao had been outside the Café taking pictures and disturbing her patrons. He had also threatened her on June 6, 2002, which she reported to the Dallas Police Department. However, neither he nor Ornan Investments, Inc. had ever pursued any legal action against her for breaching their contract.

Testifying on behalf of Ms. Xu was Officer S. Valencia, Dallas Police Department. Officer Valencia said he had known Ms. Xu for approximately five years. Her businesses (Gene's and Happy Hour Café) were in his patrol district. Officer Valencia said that Ms. Xu had a good reputation in the community. He thought she was a person of integrity and good moral character. He based this opinion on the fact he had never been called to her businesses for any disturbances, she conducted herself in a professional manner, and he had heard no one in the neighborhood complain about any business dealings involving Ms. Xu.

Applicant's attorney, Greg Gutman, testified concerning the sale of Gene's Liquor Store to Ornan Investments, Inc. He and Ornan's attorney, David Wang, had drafted the agreement's terms and conditions. He opined that the language in Applicant's Exhibit 1 which precluded Ms. Xu from engaging in "the business of operating a liquor store or beer and wine store" should not preclude Ms. Xu from obtaining the permit sought in this current application. The intent of the provision was only to restrict direct competition between off-premises retailers. Mr. Gutman also pointed out that the agreement did not preclude Ms. Xu from operating a check cashing business in the area if she desired to do so.

Documentary Evidence.

Several exhibits were admitted into evidence on behalf of the TABC Staff and Applicant. These include, among other things, the application filed by Applicant with TABC Staff, the Non-Competition Agreement between Ms. Xu and Ornan Investments, Inc. and one of the agreement's drafts, a police service call report, and copies of correspondence during negotiations for the sale and purchase of Gene's between Mr. Gutman and Mr. Wang.

ALJ'S ANALYSIS AND RECOMMENDATION

The statutory foundations for the protest to this application are cited in TABC Staff's Notice of Hearing, which was admitted into evidence. Section 61.42 of the Code provides as follows:

(a) The county judge shall refuse to approve an application for a license as a
... retailer if he has reasonable ground to believe and finds that:

...

(3) the place and manner in which the applicant for a retail dealer's license may conduct his business warrants a refusal of a license based on the general welfare, health, peace, morals, safety, and sense of decency of the people;

...

(7) the applicant is not of good moral character or his reputation for being a peaceable, law-abiding citizen in the community where he resides is bad.

This application contains appropriate certifications from the Comptroller of Public Accounts, the Dallas City Secretary and the Dallas County Clerk that the application has met the legal requirements for issuance of the permit and certificate requested. Based upon this information, along with the evidence and argument presented, the Dallas County Judge issued an Order on June 7, 2002, stating that no lawful reason existed to warrant the denial of the permit and certificate as requested by Applicant.

Further, Section 61.71 of the Code provides that the Commission may suspend or cancel an original or renewal of a retail dealer's on-premises license if it is found that the license holder:

...

(17) conducted his business in a place or manner which warrants the cancellation or suspension of the license based on the general welfare, health, peace, morals, safety, and sense of decency of the people.

The evidence presented by Mr. Chao in this case establishes that a business dispute exists between Ms. Xu and Ornan Investments, Inc. However, merely because there is a difference of opinion on how good a bargain Ornan Investments, Inc. may have made when it purchased Gene's Liquor Store, the evidence presented does not establish that Applicant, or its representative Ms. Xu, is not of good moral character or would operate the proposed licensed premises, Happy Hour Café, in a manner which is contrary to the general welfare, health, peace, morals, safety, and sense of decency of the people in Dallas County.

Mr. Chao, when pressed under cross-examination, acknowledged that Ms. Xu's actions concerning the sale of Gene's Liquor Store were legal. The ALJ, having reviewed the terms of the Non-Competition Agreement between Ms. Xu and Orman Investments, Inc., believes that Ms. Xu is in compliance of the provisions of the agreement. Her reputation in the community is good, as testified to by a Dallas Police Department officer who has known Ms. Xu for approximately five years. Ms. Xu previously operated another Commission-licensed premises without incident. TABC Staff, upon a review of Applicant's application, found no basis to join in this protest of the application. Given all of these factors, the ALJ recommends that this application for a Wine and Beer Retailer's Permit and a Food and Beverage Certificate should be granted.

FINDINGS OF FACT

1. In May 2002, Happy Hour Café, Inc., d/b/a Happy Hour Café, (Applicant) filed an original application with the Texas Alcoholic Beverage Commission (the Commission or TABC) for a Wine and Beer Retailer's Permit and a Food and Beverage Certificate, for a premises located at 10217 Harry Hines Boulevard, Suite #101, Dallas, Dallas County, Texas.
2. A protest to the application was filed on behalf of Orman Investments, Inc., by James Chao (Protestant) asserting that the application should be denied because the place and manner in which Applicant may conduct its business warrants refusal of the permit based on the general welfare, health, peace, morals, safety and public sense of decency; that Applicant was not of good moral character or that its reputation for being a peaceable law-abiding citizen in the community was bad; and that the Applicant had committed acts interfering with business or contractual relations, fraud, misrepresentation of material facts, deceptive trade practices, and bad faith.
3. On October 8, 2002, TABC Staff issued a notice of hearing informing all parties that a hearing would be held on the application and the time, place, and nature of the hearing.
4. The hearing was held on November 8, 2002, at the State Office of Administrative Hearings (SOAH), Dallas, Dallas County, Texas, before Tanya Cooper, an Administrative Law Judge. TABC Staff appeared and was represented by Timothy Griffith, TABC Staff Attorney. Applicant appeared and was represented by Greg Gutman, Attorney-at-Law. Protestant appeared and was represented by James Chao. The hearing concluded on November 8, 2002, and the record closed on that same date.
5. A business dispute exists between Applicant's representative, Jia Yin Xu, and Orman Investments, Inc., concerning the sale and purchase of another Commission-licensed premises, Gene's Liquor Store.
6. Gene's Liquor Store is licensed as an off-premises retailer of alcoholic beverages, including liquor. Approximately 20 percent of this business's revenue comes from the sale of alcoholic beverages and groceries, while check cashing is the primary source of income for the

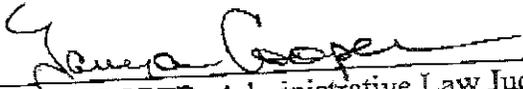
business.

7. Applicant's business is a Chinese restaurant and desires to sell wine and beer to accompany meals served on the restaurant's premises.
8. Jia Yin Xu (Ms. Xu) is not a person of bad reputation in her community; nor has she conducted her business affairs in a manner contrary to the general welfare, health, peace, morals, safety and public sense of decency. Ms. Xu has not interfered with business or contractual relationships, or committed acts of fraud, misrepresentation of material facts, deceptive trade practices, or acted in bad faith in her business dealings.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (the Commission or TABC) has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. Chapter 5 and §§ 6.01 and 11.61, and TEX. ALCO. BEV. CODE ANN. § 1.01 *et seq.*
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Chapter 2001 and 2003, and 1 TEX. ADMIN. CODE § 155.1 *et seq.*
3. Notice of the proceedings and hearing was adequate as required by TEX. GOV'T CODE ANN. Chapter 2001.
4. Based on the foregoing Findings of Fact and Conclusions of Law, a preponderance of the evidence shows that no basis exists for denial of the requested permit and certificate pursuant to TEX. ALCO. BEV CODE ANN. §§ 61.42(a)(3), 61.42(a)(7), or 61.71(a)(17).
5. Based on foregoing Findings of Fact and Conclusions, Applicant's application for a Wine and Beer Retailer's Permit and Food and Beverage Certificate should be granted by the Commission.

SIGNED this 12th day of December 2002.


TANYA COOPER, Administrative Law Judge
State Office of Administrative Hearings

DOCKET NO. 601304

IN RE HAPPY HOUR CAFÉ, INC.	§	BEFORE THE
D/B/A HAPPY HOUR CAFÉ INC.	§	
ORIGINAL APPLICATION BG, FB	§	
	§	TEXAS ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-0391)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 3rd day of January 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Tanya Cooper. The hearing convened on November 8, 2002, and adjourned on November 8, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 12, 2002. This Proposal For Decision (**attached hereto as Exhibit "A"**), was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

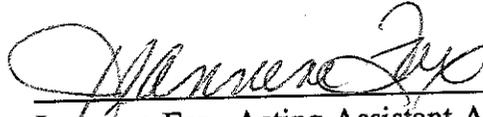
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the Original Application for a BG and FB is hereby **GRANTED**.

This Order will become final and enforceable on January 24, 2003, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile or through the U.S. Mail, as indicated below.

SIGNED this 3rd day of January, 2003.

On Behalf of the Administrator,



Jeannene Fox, Acting Assistant Administrator
Texas Alcoholic Beverage Commission

/bc

The Honorable Tanya Cooper
Administrative Law Judge
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